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Supreme Court of the United States

OCTOBER TERM, 1969

No. 883

HARRY J. COMAN, an Attorney,

Petitioner,

v.

Chief Counsel of the Judicial Inquiry on Professional Conduct, Nassau County,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

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No. .....

HARRY J. COMAN, an Attorney,

Petitioner,

v.

Chief Counsel of the Judicial Inquiry on Professional Conduct, Nassau County,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

Petitioner, Harry J. Coman, prays that a writ of certiorari issue to review the judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. Said judgment denied Petitioner's application for a common-law writ of error *coram nobis* and for an order vacating the order of said Court which disbarred Petitioner from the practice of law.

Opinions Below

Neither of the Courts below wrote an opinion. The decision of said Appellate Division, which denied Petitioner's application for the writ of error *coram nobis* is reported at 32 N.Y. A D 2d 823, 303 N.Y.S. 2d 340. The decision of the New York Court of Appeals which denied Petitioner's application for leave to appeal to it is reported

at 25 N.Y. 2d 739, —— N.E. 2d ——. The opinion of the Appellate Division on which the order was made disbarring Petitioner is reported at 28 N.Y. A D 2d 531, 279 N.Y.S 2d 419. A copy of said opinion is appended to this petition.

Jurisdiction

The judgment of the Appellate Division sought to be reviewed was made and entered on June 23, 1969. A copy thereof is appended to this petition. No petition for rehearing was filed. The order of the New York Court of Appeals, which denied Petitioner's application for leave to appeal to it, was made and entered on September 25, 1969, at which time said judgment of June 23, 1969 became final. A copy thereof is appended to this petition. No petition for rehearing was filed. The order of the Appellate Division which disbarred Petitioner and which he sought to vacate by his petition for a writ of error *coram nobis* was entered May 1, 1967. A copy thereof is appended to this petition.

The jurisdiction of this Court is invoked under § 1257(3) of the Federal Judicial Code (28 U.S.C. § 1257(3)).

Questions Presented

The questions presented are as follows:

Question 1. Where the judgment against Petitioner rests largely upon documentary evidence which, on the demand of the prosecution, Petitioner had produced under the threat of instant disbarment if he should assert his privilege against self-incrimination (a threat posed by a decision of this Court then outstanding but overruled by this Court after the conclusion of the trial but before the rendition of judgment), were Petitioner's rights under the

Fourth and Fifth Amendments to the Federal Constitution unlawfully invaded?

The texts of the Fourth and Fifth Amendments are set forth in the appendix.

Question 2. Where, in a disciplinary proceeding, the Court, aware of Petitioner's serious cardiac condition, forces him to a trial during which he collapsed on the courtroom floor, and thereafter the Court, informed by its own appointed physician that to proceed further with the trial might prove fatal to Petitioner, nevertheless denies Petitioner's requests for adjournment and, in his absence, proceeds with the trial and the examination of witnesses against him, was Petitioner deprived of his right of confrontation under Amendment VI to the Federal Constitution?

The text of the Sixth Amendment is set forth in the appendix.

AS TO QUESTION 1

Statement of the Case

The prosecution was by the Judicial Inquiry on Professional Conduct, a body appointed by the New York Supreme Court, Appellate Division, Second Department.

The approach of the Judicial Inquiry in its investigation was to demand of Petitioner his personal financial records and almost all of the files in his office. This was done by letters, telephone calls and by a subpoena duces tecum returnable before an Additional Special Term of the New York Supreme Court (4, Ex. A-1, Ex. B-1*).

* Unless otherwise specified, numbers in parentheses refer to pages of the petition for writ of error *coram nobis*, and those preceded by "Ex." refer to pages of exhibits annexed to that petition.

Under the decisional law, as it then stood, resort to the Fifth Amendment would have resulted in Petitioner's instant disbarment for "failure to cooperate in the investigation". The very act of asserting the constitutional privilege would of itself have resulted in disbarment, without inquiry into the merits of the other charges. This threat resulted from a decision of this Court, *Cohen* v. *Hurley*, 366 U.S. 117 (April 24, 1961). The decision had affirmed *Matter of Cohen*, 7 N.Y. 2d 488 (April 1, 1960). During the period here relevant, it had been followed in *Matter of Spevack*, 24[redacted] A D 2d 653 (July, 1965), affirmed by the New York Court of Appeals 16 N.Y. 2d 1048 (December 1, 1965).

Petitioner's then counsel had informed him of *Cohen* v. *Hurley* and advised him to comply with the Inquiry's demands, informing him that the alternative was automatic and immediate disbarment (5, Ex. C-1). Petitioner himself had been cognizant of that and the later New York decision (5).

Accordingly, Petitioner turned over to the Judicial Inquiry complete files of the cases in his office, pending or completed, his personal and other checkbooks, stubs and cancelled checks, bank deposit slips, bank statements, correspondence and retainers by clients (5, Ex. C-2).

On April 15, 1966, disciplinary proceedings were instituted by the Judicial Inquiry against Petitioner in the New York Supreme Court, Appellate Division, Second Department (5). Files and personal records, as above described, were turned over to the Judicial Inquiry both before and after the institution of the proceedings (5-6).

By order of the said Appellate Division dated May 19, 1966, the matter was referred to the Honorable Bernard S. Meyer, a Justice of the New York Supreme Court, as

Referee (hereinafter "the Referee") for hearing and for a report setting forth his findings (5). A hearing was held before the Referee commencing August 1, 1966, and terminating on October 19, 1966. At said hearing, there were offered in evidence and received against Petitioner, as alleged proof of Petitioner's professional misconduct, 207 documentary exhibits (5). Of these 207 exhibits 119 were documents which had been furnished to the Judicial Inquiry by Petitioner, either prior to or during the hearing, in response to the above-mentioned demands (5, Ex. D).

The case was mainly documentary. The exhibits so furnished by Petitioner largely formed the basis upon which the Referee found, and the Appellate Division adjudged, Petitioner guilty of professional misconduct.

Prior to and during the hearing Petitioner had no choice but to comply with the Judicial Inquiry's demands. By reason of *Cohen* v. *Hurley* and the State Court decisions mentioned, if Petitioner had refused to waive his privilege against self-incrimination he would have been instantly disbarred.

Then suddenly this Court removed the threat calculated to produce a waiver of the privilege. On January 10, 1967, after the Referee had filed his report, but before the Appellate Division had acted on it, came the decision of this Court in *Spevack* v. *Klein*, 385 U.S. 511, which overruled *Cohen* v. *Hurley* and, necessarily, the State Court decisions. *Spevack* held that a lawyer, in disciplinary proceedings against him, was entitled to assert his privilege under the Fifth Amendment, and could not be removed from the profession for asserting it. The Court said, per Douglas, *J.* (p. 516):

> "It is in that tradition [liberal construction] that we overrule *Cohen* v. *Hurley*. We find no room in the

> privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words 'No person . . . shall be compelled in any criminal case to be a witness against himself'; and we can imply no exception."

Since Petitioner's case had been finally submitted to the Appellate Division and was *sub judice* when this Court handed down its decision in *Spevack*, that decision was not at that time called to the attention of the Appellate Division.

The federal question sought to be reviewed was first raised by Petitioner in the court of first instance, the New York Appellate Division, Second Department, by Petitioner's application for a common-law writ of error *coram nobis* and to set aside the said judgment of disbarment. Petitioner could hardly have been expected to raise the point during the hearing or before the Referee. To hold that Petitioner or his counsel knew that *Spevack* would be decided as it was would be to apply a test of clairvoyance*.

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* Paraphrased from *United States* v. *Reincke*, 299 F. Supp. 132, 139 (D. Conn. 1964) "To hold that Holloway or his counsel knew that *Mapp* would be decided as it was would be to apply a test of clairvoyance". See *United States* v. *Manfredonia*, 391 F. 2d 229, 230 (2 Cir. 1968).

ARGUMENT

Since the order of disbarment rests upon a violation of Petitioner's rights under the Fourth and Fifth Amendments to the Federal Constitution, it may not stand.

Four decisions of this Court when read together inevitably lead to the conclusion that this judgment cannot stand. These cases are:

Gardner v. *Broderick*, 392 U.S. 273 (1968);

Uniformed Sanitation Men Assn. Inc., et al. v. *Commissioner of Sanitation of The City of New York*, 392 U.S. 280 (1968);

Garrity v. *New Jersey*, 385 U.S. 493 (1967);

Spevack v. *Klein*, 385 U.S. 511 (1967).

The twin cases of *Gardner* and *Sanitation* held that a municipal employee may not be confronted with a choice between a waiver of the privilege against self-incrimination and the loss of his job. If discharged as a result of insisting upon his privilege, he must be restored to his position. Both cases dealt with § 1123 of the New York City Charter, which provided in substance that, if an employee refused to testify with respect to his official conduct or that of any other city employee on the grounds of self-incrimination, his employment and eligibility for other city employment would terminate.

In *Gardner* the Court said (p. 279):

> "In any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment."

In *Sanitation* this Court said (p. 284):

> "But here the precise and plain impact of the proceedings against petitioners as well as of § 1123 of the New York Charter was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination."

Accordingly, in both cases it was held that § 1123 of the New York Charter, in presenting a choice between waiver of the privilege against self-incrimination and loss of employment, was unconstitutional.

Gardner and *Sanitation* must be regarded as extending *Spevack,* since they met and overcame the objection that *Spevack,* while specifically applicable to a lawyer, might not protect a municipal employee in the assertion of his privilege. In *Gardner* the Court said (p. 277): "It is argued that although a lawyer could not constitutionally be confronted with Hobson's choice between self-incrimination and forfeiting his means of livelihood, the same principle should not protect a policeman." But the Court went on to hold that it did, and that a public employee, no more than a lawyer, could be deprived of his job for the assertion of the Fifth Amendment privilege.

The principle is thus established beyond cavil that a waiver of the Fifth Amendment privilege may not be induced by a threat of loss of employment be it as policeman, sanitation employee or lawyer.

In *Gardner* and in *Sanitation* the threat of loss of livelihood was imposed by § 1123 of the New York Charter. The point to be decided here is whether *Cohen* v. *Hurley,*

a decision of this Court, now held erroneous, must not be deemed to have imposed a similar threat. Manifestly it did, unless a municipal statute is to be held to have a greater potency than a decision of the nation's highest court. Moreover, it appears here that Petitioner was aware of the threat to his means of livelihood imposed by that decision (5, Ex. C-2).

Garrity v. *New Jersey* holds that a conviction may not be based upon evidence obtained under a threat of loss of livelihood. The epitome of that decision appears from the following extract from the opinion. This Court said (385 U. S. 493, 497-8):

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. * * * We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions."

Again (p. 500):

> "We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."

The frequently debated question whether a decision of this Court is to be given merely prospective effect does not arise here. *Spevack* was handed down on January 10, 1967. The report of the Referee in the instant case had been filed December 29, 1966, but the Appellate Division did not render its decision until May 1, 1967. Whether or not *Spevack* was to be applied retroactively, there can be no question

but that it applied to cases still pending. Indeed, this Court has already held that it did.

In *Zuckerman* v. *Greason*, 386 U.S. 15, and in *Kaye* v. *Co-Ordinating Committee on Discipline*, 386 U.S. 17 (both decided February 13, 1967), this Court granted certiorari, vacated the disciplinary judgment and remanded the cases to the New York Appellate Division, in the former case to the Second, and in the latter to the First Department, "for reconsideration in light of *Spevack* v. *Klein*, 385 U.S. 511". These cases were also open, in that appeals from the orders of the Appellate Division (entered March 3, 1965 and January 13, 1966, respectively) had been taken to the New York Court of Appeals. That action by this Court was in accordance with the general rule that, even where a decision of this Court is not retroactive, it is applicable to all cases not yet finally determined when its decision was rendered. *O'Connor* v. *Ohio*, 385 U.S. 92 (1966); *Linkletter* v. *Walker*, 381 U.S. 618 (1964); *Mancusi*, v. *De Forte*, 392 U.S. 364 (1968), footnote 2 (p. 365).

When *Zuckerman* came back to the New York Court of Appeals on such remand, that Court attempted this distinction from this Court's decision in *Spevack*: that, while evidence illegally obtained in a disciplinary proceeding might not be used against the attorney in a subsequent criminal proceeding, it could be used in that same disciplinary proceeding to obtain disbarment. *Matter of Zuckerman*, 20 N.Y. 2d 430 (1967); certiorari denied 390 U.S. 925*; rehearing denied 390 U.S. 975. Said that Court (p. 438):

> "The evidence which these appellants produced before the Referee cannot be used against them in any crimi-

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* Certiorari may well have been denied for the reason that in *Zuckerman* (unlike this case) there was no evidence that the attorney in making the disclosures had been motivated by the holding in *Cohen*. See dissenting opinion of Fuld, Ch.J.

> nal proceeding. They had no privilege against making disclosure usable only in a disciplinary proceeding. The constitutional privilege applies only in the case of evidence which might be used against them in a criminal case under the language of the Fifth Amendment."

This leads to an absurd result. When the plea is interposed, it cannot be determined whether the evidence sought will tend to convict of a criminal offense or merely to subject the attorney to disciplinary punishment, unless the Court first compels its disclosure, and that in itself would be a violation of the Fifth Amendment.

The New York Court does not distinguish *Spevack*. It wholly denies its authority. For, if in a disciplinary proceeding a lawyer may be required to prove his own misconduct, there is no reason why he should not be disbarred for refusing to do so. *Cohen* v. *Hurley* would have been constitutionally acceptable and there would have been no reason for overruling it.

Moreover, were *Spevack* intended merely to prohibit the compulsion of testimony usable in a criminal proceeding which might follow the disciplinary one, *Spevack* would be meaningless, since the attorney has such protection under the Fifth Amendment and would not need *Spevack*. What *Spevack* actually did was to equate punishment in a disciplinary proceeding with punishment in a criminal proceeding, and evidence which might disbar with evidence which might convict, and to hold that, in either instance, the Fifth Amendment applied and the attorney could not be compelled under threat to furnish such evidence.

This is the true basis of *Spevack*, and it finds support in *In Re Ruffalo*, 390 U.S. 544 (April 8, 1968), also a dis-

ciplinary proceeding, where this Court said (p. 550): "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer". And again (p. 551): "These are adversary proceedings of a quasi-criminal nature". In *Spevack*, Mr. Justice Douglas writing for the Court was emphatic (p. 516):

> "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as 'the use of legal process to force from the lips of the accused individual the evidence necessary to convict him . . .' *United States* v. *White*, 322 U.S. 694, 698."

Manifestly, to hold that evidence unlawfully obtained under a threat of disbarment could be used to obtain a disbarment would negate *Spevack* entirely.

AS TO QUESTION 2

Statement of the Case

Petitioner's petition for writ of error *coram nobis* sets forth the following facts which are not contradicted:

Petitioner was not present during the presentation of his own case, or during the testimony of the rebuttal witnesses (11).

The Referee proceeded to a determination pursuant to a stipulation (10) which Petitioner, after a cardiac attack and collapse in Court, had no choice but to accept.

Petitioner had had a long history of cardiac illness and two hazardous operations (6-7). Before the trial, the Ref-

eree had been advised by the affidavits of competent physicians that the strain of the trial might be fatal to Petitioner (3). Despite counsel's request for an adjournment the Referee went ahead (Ex. E-2). During the second day of the trial Petitioner collapsed in court as a result of a heart attack and was immediately hospitalized. The Referee thereupon appointed a physician nominated by counsel for the Judicial Inquiry to examine Petitioner and to report on his physical condition (Ex. E-2). The physician's report was that Petitioner's further presence at the trial could bring on another attack which might prove fatal (Ex. H-2).

This report of the Referee-appointed physician is equivalent to a finding by the Court that Petitioner was in no position to stand trial. Application by Petitioner's counsel for a postponement was denied (Ex. E-2). Hence, when Petitioner, on October 3, 1966, entered into the stipulation under which the trial proceeded and was concluded in his absence, he was not in a position to waive confrontation, a fact which must have been obvious to the Referee. Waiver implies a choice. Petitioner had no choice, since the alternative was to remain in court, with a great probability of sustaining a fatal attack. Under these circumstances, the Referee could not lawfully accept the waiver and he had no alternative but to grant the original request for an adjournment, or to grant a mistrial.

Petitioner's history of critical illnesses and hazardous operations goes back at least as far as March 1958, when Petitioner underwent his first open-heart surgery (6, Ex. F-2). In this procedure, Petitioner was unconscious for approximately 28 hours and suffered very serious loss of blood. As a lung had collapsed in the surgery, a series of supplementary operations were then performed on the trachea and throat; Petitioner was confined at the Hahneman Hospital in Philadelphia, Pennsylvania, for approxi-

mately 2½ months, with repeated blood transfusions (6-7). After a period involving other operations and medical attention, Petitioner was advised in December 1965 by Dr. Alvin Bakst that it would be necessary to undergo a new open-heart surgery procedure, because his aortic valve was re-calcified, and he was again suffering aortic stenosis. Accordingly, on January 13, 1966, Petitioner's aortic valve was removed from the heart, an artificial McGovern ball valve was inserted, and a heart pump was employed (Ex. F-2).

The attack occasioning this last mentioned operation occurred during the period that Petitioner's professional conduct was under investigation by the Judicial Inquiry. The formal charge was filed, and the proceeding against Petitioner was initiated by order to show cause dated April 18, 1966.

On May 23, 1966, Petitioner employed Ex-judge Joseph A. Solovei, as trial counsel (8, Ex. E-1). It soon became apparent, however, that Petitioner had not recovered from the effects of the serious heart operation of January 13th and that it would be hazardous for him to stand trial (8). On or about June 20, 1966, Judge Solovei applied for an adjournment, but the Referee would not adjourn the matter beyond August 1st; the trial commenced at that time (Ex. E-1, 2). The several applications for postponement do not appear in the record of the trial. They do appear in the affidavit of Judge Solovei (Ex. E-1).

The matter culminated on August 2nd, the second day of the trial, when Petitioner suffered a most severe heart attack; he dropped to the floor of the courtroom and was given oxygen and heart massage to keep him alive (Ex. E-2). A police ambulance was summoned and Petitioner, Judge Solovei accompanying him, was removed to the Long

Island Jewish Hospital where he received emergency treatment by the doctors attached to the hospital. His condition was considered critical by them. Petitioner remained at the hospital in such condition for almost two weeks under the care of Dr. Donald S. Kent, a heart specialist. Thereafter he was removed to his home and received further treatment from Dr. Kent (Ex. E-2).

In seeking further postponement, Judge Solovei presented to the Referee (6, Ex. E-2) the affidavit of Alvin A. Bakst, M.D., the surgeon who had performed the operation on January 13th. After reciting the nature of the open-heart procedure that Dr. Bakst had followed, Dr. Bakst said in part (Ex. F-2, 3):

> "This operation was made doubly dangerous because Mr. Coman had previously had an open heart procedure for Aortic Stenosis. This first open heart procedure had significantly and seriously weakened his heart to the point that the second operation carried with it a fifty percent mortality rate.
>
> * * * * *
>
> "It is my opinion that the stress and strain that would be entailed in the attendance of hearings contemplated in this matter would not only be harmful to Mr. Coman's condition, but might well prove fatal."

On June 30, 1966, Donald S. Kent, M.D., a Fellow of the American Board of Cardiologists, wrote a letter (Ex. G-1) which likewise was submitted to the Referee. In it Dr. Kent concluded:

> "It is my feeling that Mr. Coman's cardiac condition although much improved from surgery and stable at the moment, might be seriously impaired under moments of stress such as undue excitement which might

result from appearances in court and as a result of this serious consequences detrimental to his health could occur which might even prove fatal."

This prediction unhappily almost proved true by the collapse of Petitioner on August 2d.

Following this episode in court, the Referee appointed a physician selected by the Judicial Inquiry, a Dr. Harvey L. Myers, to examine Petitioner (9). He made a report in writing to the Referee dated August 27, 1966 (Ex. H-1) which stated in part as follows:

> "In summary, we have an extremely ill individual, who after extensive surgery is now able to get around with extremely marginal cardiac compensation, by virtue of a plastic heart valve. * * * This patient did collapse in court, and there is a reasonable probability that this situation could be repeated and on the next occasion, recovery might not be complete and the outcome might even be fatal."

On September 6, 1966, at a meeting held in the Referee's Chambers, at which Petitioner was not present, the following procedure was suggested by the Referee and agreed upon by counsel: that there would be no further testimony adduced by the Inquiry to complete its case; that Petitioner would make a written statement in lieu of his testimony and would not be cross-examined; and that the Inquiry would then have the opportunity to produce evidence or statements in rebuttal. The Referee directed that Petitioner's attorney produce Petitioner in Court for the purpose of stating on the record his consent to the procedure contemplated (10, Ex. E-3). Accordingly, Petitioner was required to appear in Court on October 3, 1966, and the following occurred (10):

"The Court: The one thing that remains now is that I would like to have the statement made on record by Mr. Coman with respect to the procedure that we have adopted. You were not present, Mr. Coman, at the last conference which was held in chambers after you were hospitalized, but at that conference, stating my recollection of it—but if there is any question on anybody's part, please correct me—it was agreed that in view of your physical condition there would be no further testimony adduced by the Inquiry to complete its case; that you would be permitted to make a written statement and would not be cross-examined; and that the Inquiry would then have the opportunity to produce evidence or statements in rebuttal to whatever is stated in the statement that you chose to file.

"So that there will be no question with respect to this form of procedure, which is somewhat unusual in a proceeding of this kind, I asked Judge Solovei to be sure to produce you in court, not for the purpose of questioning, but simply for the purpose of stating on the record your consent to that procedure, because otherwise there could be some question concerning your rights.

"Mr. Coman: I definitely consent to the procedure which you have just outlined, your Honor, and the stipulations and agreements entered into by my attorney on my behalf."

Of course, Petitioner consented—to him the alternative was a death sentence.

The trial then proceeded in the absence of Petitioner. Petitioner's counsel filed Petitioner's statement in lieu of his testimony. Three witnesses were called in rebuttal by the Inquiry, two secretaries formerly employed by Peti-

tioner and one, an attorney who had collaborated with Petitioner as trial counsel in certain of Petitioner's litigations. These witnesses were cross-examined by Judge Solovei as Petitioner's counsel, but of course, Petitioner was not on hand to assist counsel in such cross-examination. Neither Petitioner nor his counsel were apprised in advance who these witnesses would be, and Petitioner was thus unable to assist in preparing for their cross-examination (11).

The federal question sought to be reviewed was first raised by Petitioner in the court of first instance, the New York Appellate Division, Second Department, by Petitioner's application for a common-law writ of error *coram nobis* and to set aside the said judgment of disbarment.

ARGUMENT

Petitioner was deprived of his constitutional right under the Sixth Amendment to be confronted with witnesses against him.

By the Sixth Amendment "in all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * * and to have the Assistance of Counsel for his defence".

The Sixth Amendment is made applicable to the States by the Fourteenth. In *Brookhart* v. *Janis*, 384 U.S. 1 (1966) this Court said (pp. 3-4):

> "The Sixth Amendment provides that: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .' And in *Pointer* v. *Texas*, 380 U.S. 400, 406, we held that the confrontation guarantee of the Sixth Amendment including the right of cross-examination 'is "to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Malloy* v. *Hogan, supra*, 378 U.S., at 10.' "

It cannot now be doubted, since *Spevack* v. *Klein*, 385 U.S. 511 (1967) and *In Re Ruffalo*, 390 U.S. 544, 551 (1968), both disciplinary proceedings, that "These are adversary proceedings of a quasi-criminal nature". In the cases mentioned, this Court surrounded the attorneys with all of the protections afforded by the Bill of Rights.

The right of confrontation under the Sixth Amendment exists even in administrative proceedings; especially is this so where the result of the proceeding might be that the

respondent would lose his means of livelihood. It was so held in *Greene* v. *McElroy*, 360 U.S. 474 (1959), in which this Court said (p. 497):

> "This Court has been zealous to protect these rights [confrontation] from erosion. It has spoken out not only in criminal cases [citing cases], but also in all types of cases where administrative and regulatory actions were under scrutiny [citing cases]."

Confrontation of the witnesses against him has been held to be imperative even in a hearing before a committee of three practising lawyers appointed by the court "for the purpose of investigating the character and fitness" of an applicant for admission to the bar. *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963). *A fortiori* the Sixth Amendment applies, and confrontation is essential, where the question is not admission to the bar but expulsion from it.

Confrontation is an essential requirement of a fair trial. In *Pointer* v. *Texas*, 380 U.S. 400 (1965), this Court said, by Mr. Justice Black (p. 405):

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

Confrontation involves not only representation at the trial by an attorney but also the right of Petitioner himself to be present in order that he may "confront" the witnesses against him and be at his counsel's elbow to assist him on cross-examination. "The defendant is entitled to be pres-

ent at the time of trial so as to render assistance to his counsel * * * ." *Ashley* v. *Pescor*, 147 F. 2d 318, 319 (8 Cir. 1945).

True, confrontation may be waived, except in capital cases. However, to constitute a proper waiver the accused must have a choice. Where the only choice is to allow the proceeding to go ahead without him, there is no choice, and, hence, there can be no waiver. In *Nichols* v. *Cities Service Oil Company*, 171 F.Supp. 400 (D. Md. 1959), the Court, citing 56 Am. Jur., "Waiver", § 12, p. 113, said (p. 409):

> " 'Voluntary choice is of the very essence of waiver.' "

See also *Eastman* v. *Pelletier*, 47 A. 2d 298, 301 (Vt. Sup. 1946); *Glendale* v. *Coquat*, 52 P. 2d 1178, 102 A.L.R. 837, 841 (Ariz. Sup. 1935).

In the present case, Petitioner had no choice. Two eminent physicians, and also one selected by the Judicial Inquiry and appointed by the Court, had given as their opinion that for Petitioner to continue at the hearing might be fatal. There was no evidence to the contrary.

Judge Rippey, writing for the New York Court of Appeals in *Davison* v. *Klaess*, 280 N.Y. 252 (1939) (quoting from 67 C.J. 289-291), said (p. 261):

> "Waiver is 'voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, *which except for such waiver the party would have enjoyed*' (67 C.J. 289; *Masons' Supplies Co.* v. *Jones*, 58 App. Div. 231; affd., 172 N.Y. 598.") [Emphasis ours].

To the same effect see *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

The case bears a resemblance to those in which it was held error to proceed to a hearing or trial in the face of affidavits or other proof that the accused would be unable by reason of physical or mental illness to attend the trial or, if present, would be unable to assist counsel in his defense. *In re Hunt,* 276 F.Supp. 112, 118 (E.D. Mich. 1967); *People* v. *Codarre,* 10 N.Y. 2d 361, 364 (1961); *Ashley* v. *Pescor,* 147 F. 2d 318 (8 Cir. 1945); *People* v. *Kousch,* 12 N.Y. A D 2d 730 (4th Dept. 1960) and *People* v. *Passante,* 15 N.Y. A D 2d 631 (4th Dept. 1961).

CONCLUSION

By this application for certiorari Petitioner seeks to right a situation in which he has twice been deprived of a choice guaranteed to him by the Federal Constitution. He has been deprived "in a criminal case" of the right to choose whether to surrender or to withhold documentary evidence which might tend to incriminate him. He has been deprived of the right to choose whether or not to waive confrontation where the alternative of such waiver was to endure a trial which might prove fatal to him.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, N. Y.
November 19, 1969

Ben A. Matthews
Harold Harper
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APPENDICES

APPENDIX A

Constitution of the United States

AMENDMENT IV

(1 U.S. Stat. 21; U.S.C.A. Const. Amend. IV, p. 4)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

(1 U.S. Stat. 21; U.S.C.A. Const. Amend. V, p. 4)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

(1 U.S. Stat. 21; U.S.C.A. Const. Amend. VI, pp. 4-5)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascer-

tained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX B

Judgment of Appellate Division Denying Petition for Writ of Error *Coram Nobis*

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 23, 1969

HON. MARCUS G. CHRIST,

Acting Presiding Justice,

HON. SAMUEL RABIN,
HON. JAMES D. HOPKINS,
HON. A. DAVID BENJAMIN,
HON. PHILIP M. KLEINFELD,

Associate Justices.

In the Matter of

Harry J. Coman.

Samuel Greason,

Petitioner;

Harry J. Coman,

Respondent.

Order on motion

In the above disciplinary proceeding, this court by decision and order dated May 1, 1967, having granted peti-

tioner's motion to confirm the Justice's report and having directed that the respondent Harry J. Coman, be disbarred and his name struck from the roll of attorneys and counselors at law in the State of New York; and the respondent having moved to vacate said disbarment order;

Now, on reading and filing the notice of motion, dated March 12, 1969, the petition of Harry J. Coman, verified March 12, 1969; affidavits of Jerome H. Doran and Joseph A. Solovei and respondent's brief in support of said motion; the affidavit of Edward Margolin in opposition thereto; and upon all the papers filed herein; and Harper & Matthews, Esqs., having appeared for respondent and Edward Margolin, Esq., having appeared for petitioner; and due deliberation having been had thereon; and upon the decision slip of the court herein, heretofore filed and made a part hereof; it is:

ORDERED that respondent's motion to vacate the order of this court, dated May 1, 1967, is hereby denied.

Enter:

/s/ HERMAN M. POGUL
Clerk of the Appellate Division

APPENDIX C

Order of Court of Appeals Denying Motion for Leave to Appeal

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-fifth day of September A. D. 1969.

Present,

HON. STANLEY H. FULD,

Chief Judge, presiding.

Mo. No. 817

In the Matter of

Harry J. Coman, An Attorney,

Appellant,

Samuel Greason,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

GEARON KIMBALL
Deputy Clerk

APPENDIX D

Opinion of Appellate Division Directing Disbarment of Petitioner

SECOND DEPARTMENT MAY, 1967

(May 1, 1967)

In the Matter of HARRY J. COMAN, an Attorney, Respondent. SAMUEL GREASON, Petitioner.—In this proceeding to discipline an attorney for professional misconduct, petitioner moves to confirm the report of the Justice of the Supreme Court to whom this court had referred the issues for hearing and report. Respondent was admitted to the Bar by this court on June 26, 1932. The charges against respondent were set forth in 13 specifications (A to M, inclusive). A hearing was held as to specifications A to D, inclusive; and hearing on the remaining specifications was held in abeyance. Under specification A, the reporting Justice found that respondent had failed to maintain an escrow bank account from 1960 to March 16, 1965 for funds belonging to clients in negligence actions; had commingled such trust funds with his personal funds and had made disbursements from said commingled funds for his own personal and business purposes over the same period of time; had failed to pay his clients in two cases the full amounts of the recoveries due to them; and had deposited, into his own bank account, as to seven cases, clients' funds or funds of clients retained by him for payments to lienors and, thereafter, had caused the balance in his account to become insufficient to cover these funds. Under specification B, it was found that respondent (1) had failed to honor liens and had withheld money from clients and lienors, appropriating

the money to his own use, and (2) had failed to obtain the consent of lienors to the settlement or adjustment of claims against third parties, contrary to section 29 of the Workmen's Compensation Law. Under specification C, the Justice found that in a certain infant's case respondent had deposited $700 into his own bank account and had used that money, and had also appropriated $300 to his own use, whereas a court order of compromise required the $700 to be deposited in a particular bank to the credit of the infant and the $300 to be paid to a named doctor. Under specification D, it was found that respondent (1) had failed to file closing statements in 21 negligence actions and had untimely filed statements in 8 such actions, (2) had failed to serve, file and provide clients in 7 negligence actions with copies of closing statements, (3) had filed inaccurate and incorrect closing statements in 20 actions and (4) had improperly charged expenses to a client and had made these improper charges on the pertinent closing statement. The above-mentioned findings are fully sustained by the evidence. The motion to confirm the report is granted. In our opinion, respondent is unfit to be a member of the Bar. He is disbarred and his name is ordered removed from the roll of attorneys and counselors at law, effective forthwith. Beldock, P.J., Ughetta, Christ, Brennan and Rabin, JJ., concur.

APPENDIX E

Order of Appellate Division Disbarring Petitioner

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 1, 1967

HON. GEORGE J. BELDOCK,

Presiding Justice,

HON. HENRY L. UGHETTA,
HON. MARCUS G. CHRIST,
HON. ARTHUR D. BRENNAN,
HON. SAMUEL RABIN,

Justices.

In the Matter of Harry J. Coman, an attorney.

Samuel Greason,

Petitioner;

Harry J. Coman,

Respondent.

Order of disbarment

A proceeding having been instituted in this court by Samuel Greason, Chief Counsel of the Judicial Inquiry on Professional Conduct, Nassau County, in respect to respondent Harry J. Coman, an attorney and counselor at law, admitted to practice by this court on June 28, 1932

under the name of Harry J. Cohen; the petition and amended petition praying that the said respondent be disciplined for professional misconduct upon the charges therein set forth; the respondent having duly filed his answer; this court by order dated May 19, 1966 having referred the issues raised by the pleadings to the Honorable Bernard S. Meyer, Justice of the Supreme Court, for hearing and for a report setting forth his findings upon the issues; the said Justice having held hearings and having filed his report dated December 29, 1966, together with the testimony and exhibits; and the petitioner having moved to confirm the report of said Justice;

Now, upon the said petition and amended petition verified May 20, 1966; the answer of respondent verified May 31, 1966; the said report, testimony and exhibits, and upon all the papers filed herein; and due deliberation having been had thereon; and Mr. Harold Spitzer, Esq., appearing for petitioner and Mr. Joseph A. Solovei, Esq., appearing of counsel for respondent; and upon the opinion and decision slip of the court herein, heretofore filed, it is:

ORDERED that the said motion by petitioner is hereby granted; and it is further

ORDERED that the said report of the Justice be and the same hereby is confirmed; and it is further

ORDERED that effective May 1, 1967, the respondent Harry J. Coman be and he hereby is disbarred from the practice of law and his name is hereby directed to be struck from the roll of attorneys and counselors at law; and it is further

ORDERED, pursuant to statute (Judiciary Law, §90), that effective May 1, 1967, the said Harry J. Coman be and he

hereby is commanded to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another; and that he is hereby forbidden to appear as attorney or counselor at law before any court, judge, justice, board, commission or other public authority or to give to another an opinion as to the law or its application, or any advice in relation thereto.

Enter:

/s/ HERMAN M. POGUL
Clerk of the Appellate Division

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 17 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 883

HARRY J. COMAN, an Attorney,

Petitioner,

v.

CHIEF COUNSEL OF THE JUDICIAL INQUIRY ON PROFESSIONAL CONDUCT, NASSAU COUNTY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD MARGOLIN, *Respondent,*
Chief Counsel,
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320 Old Country Road,
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DONALD J. PAYTON,
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IN THE

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CHIEF COUNSEL OF THE JUDICIAL INQUIRY ON PROFESSIONAL CONDUCT, NASSAU COUNTY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner prays for review of an order of the Supreme Court, Appellate Division, State of New York, Second Department, denying a motion for common law writ of error *coram nobis*, which decision denied Petitioner's motion to vacate a prior order of the said Court disbarring Petitioner, entered on May 1, 1967. This decision became final when leave to appeal to the New York State Court of Appeals was denied (25 N.Y. 2d 739).

Jurisdiction

Jurisdiction for review is challenged in that the Petitioner has failed to demonstrate in what way the order appealed from impaired his rights and privileges. It is his claim that his constitutional rights have been violated by the underlying judgment of 1967, rather than by the order of 1969 appealed from.

Petitioner has attempted to obtain review by this Court of the 1967 decision, although he never raised any constitutional issue before this time and he never took an appeal in the State courts from that decision. Petitioner is now making a belated attempt to obtain a review of issues which appeared in the record below and were never challenged prior to this time.

Statement of Proceedings Below

In or about January 1964 the Judicial Inquiry commenced its investigation of the Petitioner. As a result of that investigation, by Order of the Appellate Division, Second Department, dated April 4, 1966, disciplinary proceedings were directed to be brought against Petitioner.

During the course of the investigation Petitioner voluntarily produced certain records and files pursuant to oral or written requests and subpoenas of the Judicial Inquiry.

At all times during the course of this investigation, as Petitioner concedes, he was represented by counsel.

After having been duly served with a copy of the Petition in this disciplinary action the issues therein raised were thereafter referred to the Hon. Bernard S. Meyer, Justice of the Supreme Court, for hearing and a report to the Appellate Division, Second Department (Order dated May 19, 1966).

On August 2, 1966 hearing of this action commenced with Petitioner present in court and represented by counsel.

On August 3, 1966 during the course of the hearing a request for an adjournment was made and received by Petitioner's counsel due to the fact that Petitioner had suffered a heart attack while present in court. Petitioner was then removed to a hospital for treatment.

Subsequently conferences by both counsel with the Court resulted in a stipulation as to the procedure to be followed as to the future course of this proceeding.

On October 3, 1966 in open court Petitioner, with his counsel present, stipulated that he would submit a written statement in his defense and in return would not be cross-examined by the Judicial Inquiry; the Judicial Inquiry also submitted a written statement to complete its case and in view of Petitioner's physical condition would introduce no further evidence, however, the Judicial Inquiry would have the opportunity to produce evidence or statements to rebut whatever was stated in the statement Petitioner was to file.

Petitioner's statement, dated September 30, 1966, sixty pages in length, was then received in evidence in lieu of his testimony.

By consent the matter was then adjourned to October 19, 1966 to permit a full review of Petitioner's statement in evidence and further, to determine the necessity for any further hearings in rebuttal.

On October 19, 1966, exercising its right to rebut pursuant to the above stipulation, Respondent took testimony from two former secretaries of Petitioner with respect to certain office procedures referred to in the statement, which testimony was subject to the right of cross-examination by Petitioner's counsel who was present at the hearing. The hearings were then concluded.

The Referee filed his report with the Appellate Division, Second Department, on December 29, 1966.

By Order of the Appellate Division, Second Department, dated May 1, 1967, Petitioner was disbarred from the practice of law. *No appeal was taken from this decision.*

Some two years later Petitioner, by notice of motion for a common law writ of error *coram nobis*, sought review of this decision and for the first time raised constitutional issues. Said motion was denied by an order of the Appellate Division (32 A.D. 2d 823) and a motion for leave to appeal to the New York Court of Appeals (25 N.Y. 2d 739) was also denied.

POINT I

An application in the nature of coram nobis is not available.

The writ of *coram nobis* presupposes violation of Petitioner's constitutional rights not appearing on the record, and no negligence which could be attributed to the Petitioner for the failure to have brought the alleged error to the attention of the Court at the time of trial. The proceeding is not a substitute for a new trial, appeal or other statutory remedy (Frank, *"Coram Nobis"*, 1953, p. 23). As stated in *People* v. *Brown*, 13 N.Y. 2d 201:

> "The writ of error coram nobis * * * is an emergency measure born of necessity to afford a defendant a remedy against injustice when no other avenue of judicial relief is, or ever was, available to him. (People v. Howard, 12 N.Y. 2d 65, 66). In short, it is not a substitute for an appeal or for a motion for a new trial and, if any one of these procedures was, or could have been, invoked, the defend-

> ant may not thereafter seek to set aside a judgment of conviction by resorting to coram nobis. (citing cases)."

All the issues raised on this appeal, beginning with the Petitioner's claimed medical disability, together with all the alleged facts claimed to be constitutional violations, were in the record before the Court in the 1967 decision. No objection was made by either Petitioner or his counsel to the introduction of any of this evidence and further, no objection was made to preserve any of these claimed errors for future appeal. In fact, no appeal was ever filed by Petitioner until this time.

The decision in *People* v. *Brown* (*supra*) expounds a principle followed in the Federal courts (cf. Title 28, United States Code, Section 2255). In *Larson* v. *United States*, 275 Fed. 2d 673, 674, it was held that:

> "* * * the prisoner may not now substitute a proceeding under Section 2255 for the orderly appellate process he deliberately declined to use * * * years ago * * *."

See also *United States* v. *Marchese*, 341 Fed. 2d 782, cert. den. 382 U.S. 817, and *Black* v. *United States*, 269 Fed. 2d 38, cert. den. 361 U.S. 398.

We therefore respectfully submit that since the alleged violations of constitutional rights appear in the trial record the writ of error *coram nobis* does not extend to such a situation. In such circumstances the Petitioner is relegated to remedies afforded by way of appeal (*Matter of Hogan* v. *Court of General Sessions, New York County*, 296 N.Y. 1; *People* v. *Sadness*, 300 N.Y. 69; *People* v. *Howard*, 12 N.Y. 2d 65; *People* v. *Kendricks*, 300 N.Y. 544).

POINT II

There are no constitutional issues involved.

Prior to our discussion of the constitutional issues raised by the Petitioner in his motion, we respectfully submit that during the entire proceeding Petitioner acquiesced in the procedures adopted and made no attempt to raise the issues on an appeal.

Petitioner, however, first contends in his brief that by complying with the request of the Judicial Inquiry in the production of his records and files, his Fourth Amendment rights were violated in that he was a victim of an unreasonable search and seizure. At the outset this position is contradictory in that in his statements of defense on his behalf he admits and emphasizes the full cooperation given to the Judicial Inquiry during the course of the investigation in producing these records.

As a matter of law this issue has been decided in *Jones* v. *United States*, 258 Fed. 2d 420, 422, where the Court held:

> "Illegal search and seizure can not be raised by a petition for coram nobis nor can these points be raised under Section 2255."

In any event, even assuming that the production of the papers pursuant to requests can be equated with a seizure, there was nothing which contravened the provisions of the Fourth Amendment. The protection supplied by the Constitution is against *unreasonable* seizures. The standard for what is and is not reasonable is that of probable cause.

In the State of New York the Appellate Division of the Supreme Court has the right to order and conduct an investigation into an attorney's methods of practicing law (McKinney, Consolidated Laws of New York, Vol. 28,

Judiciary Law, Section 90). The right to subpoena follows as a matter of course. In issuing a subpoena a duly constituted investigative body is not required to make a preliminary showing of probable cause (*A'Hearn* v. *Committee on Unlawful Practice of Law*, 30 A.D. 2d 47, affirmed 23 N.Y. 2d 916, cert. den 395 U.S. 959). Since the use of a subpoena does not violate the recipient's constitutional rights, a request for records and delivery pursuant thereto cannot be characterized as an unreasonable seizure within the meaning of the Fourth Amendment. (See also, *Shapiro* v. *United States*, 335 U.S. 1.)

Petitioner further contends, in the light of *Spevack* v. *Klein*, 385 U.S. 511 and *Garrity* v. *New Jersey*, 385 U.S. 493, that he was compelled in a criminal case, under penalty of disbarment, to be a witness against himself, citing the overruled doctrine of *Cohen* v. *Hurley*, 366 U.S. 117. As a matter of law this contention has been fully discussed and not upheld in disciplinary proceedings. (*Matter of Zuckerman* v. *Greason*, 20 N.Y. 2d 430, cert. den. 88 S. Ct. 856; *Matter of Klebanoff*, 21 N.Y. 2d 920, cert. denied 393 U.S. 840; *Sgarlato* v. *Klein*, 22 N.Y. 2d 813, cert. denied 37 L.W. 3193).

Further, this Court in discussing the effects of both the *Garrity* and *Spevack* decisions, had made further refinements as to the meaning and use of the privilege against self-incrimination. In *Gardner* v. *Broderick*, 392 U.S. 273, Mr. Justice Fortas stated:

> "We agree that these factors differentiate the situations. If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunify with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, Garrity v. New Jersey, supra, *the privilege against self-incrimination would not have been a bar to his dismissal.*" (Emphasis supplied)